

# JUSTICE AND ETHICS IN PENAL PRACTICE

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## Abstract

This volume begins with a critical commentary on a selection of works published by Robert Canton between 1997 and 2007. Works and commentary are now submitted in 2007 in partial fulfilment of a PhD by a published work. The works themselves make up the rest of the volume.

Much of the writing emerged from the author's attempts to make sense of the challenges of working as a probation officer and to practise in a manner that not only 'works', but is fair and wise. The overview demonstrates the development in the author's thinking over several years.

The context and chronology of the writings are set out and the books themselves are summarised. The commentary then proceeds to try to identify some constant, though developing, themes and so to demonstrate that a set of writings with diverse titles can be seen to amount to a thesis.

Two themes stand out:

- the concept of *legitimacy* which points to the need for (and possibility of) an alliance between moral principles and effective practice
- the complexity of 'penalty' - both in terms of the influences that shape it and of its many meanings, functions and consequences.

The commentary concludes with an attempt to identify the original contributions to knowledge made through these works.

# Chapter 1 A Guide to the Overview and to the Published Works

This overview represents a critical commentary on a selection of works published by Robert Canton between 1997 and 2007 and is submitted in partial fulfilment of a PhD by published work in 2007. This overview demonstrates the development in the author's thinking and sets out the original contributions to knowledge made through these works.

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The published works, appended to this document, have appeared in refereed journals or as book chapters.

Throughout, a reference in **bold text** points to one of the published works.

### *The Published Works*

- 1 Canton, R. (1995) 'Mental Disorder, Justice and Censure' in David Ward and Malcolm Lacey (eds.) *Probation: Working for Justice*, London: Whiting and Birch
- 2 Canton, R. (2002) 'Rights, Probation and Mentally Disturbed Offenders' in David Ward, John Scott and Malcolm Lacey (eds.) *Probation: Working for Justice* (2nd edition) Oxford: Oxford University Press
- 3 Canton, R. (2003) *The Development of Alternative Sentences to Imprisonment in Ukraine: A Concept Paper* (second edition) Nottingham: University of Nottingham Human Rights Law Centre
- 4 Canton, R. and Eadie, T. (2004) 'Social Work with Young Offenders:' in Mark Lymbery and Sandra Butler (eds.) *Social Work Ideals and Practice Realities*, Basingstoke: Macmillan
- 5 Canton, R. (2005) 'Risk Assessment and Compliance in Probation and Mental Health Practice' in Brian Littlechild and Debra Fearn (eds.) *Mental disorder and criminal justice: Policy, provision and practice*, Lyme Regis: Russell House
- 6 Canton, R. and Eadie, T. (2005) 'From Enforcement to Compliance: Implications for supervising officers', *Vista* **9** (3): 152 – 158
- 7 Canton, R. (2006) 'Penal Policy Transfer: A Case Study from Ukraine' *Howard Journal of Criminal Justice*, **45** (5): 502 - 520
- 8 Canton, R. (forthcoming) 'Working with Mentally Disordered Offenders' in Simon Green, Elizabeth Lancaster and Simon Feasey (eds.) *Addressing Offending Behaviour: Context, Practice, Values*, Cullompton: Willan Publishing
- 9 Canton, R. (2007) 'Probation and the Tragedy of Punishment' *Howard Journal of Criminal Justice*, **46** (3): 236 - 254
- 10 Mair, G. and Canton, R. (2007) 'Sentencing, Community Penalties and the Role of the Probation Service' in Loraine Gelsthorpe and Rod Morgan (eds.) *Handbook of Probation*, Cullompton: Willan Publishing

### *The Published Works: Context*

For most of his professional career, Canton worked in the Probation Service, as a practitioner and a manager. Many of his original theoretical interests arose directly from his attempts to make sense of his professional experiences. In particular, he has been keen to explore the moral significance of criminal justice practice. If the term *criminal justice* is to have more than a persuasive force (Urmson 1968), then the practices of the 'system' must promote justice and its activities must be carried out in a just manner (Lacey 1994).

In its origins, probation proclaimed its moral purpose and significance (Bochel 1976; McWilliams 1983; Garland 1985). As the Service redefined its original mission in secular and therapeutic terms, however, moral discourse became less fashionable. In more recent years, 'actuarial justice' (Feeley and Simon 1994) and the principles of managerialism have also made it more difficult to invoke morality. As Bottoms notes, the "actuarial dimension of modern managerialism" can serve to suppress political and moral responses to crime and punishment, so that "it may become difficult to counterpoise the traditional language of, for example, 'justice', against the aggregative and instrumental assumptions of an actuarial approach." (Bottoms 1995: 33) This is one aspect of a broader development in the practices of crime and punishment. As Garland has shown, crime has increasingly come to be regarded less in terms of vice or even personal pathology: "The working assumption ... is that crime is an event - or rather a mass of events - that requires no special motivation or disposition, no pathology or abnormality, and which is written into the routines of contemporary social and economic life." (Garland 2001: 16) The response to crime, accordingly, is the management of these events.

A further challenge comes from the 'what works' initiative (McGuire 1995; Chapman and Hough 1998) that became the dominant paradigm of

contemporary probation practice, giving a strongly (and purely) instrumental tone that jeopardises the possibility of a moral interpretation or critique. But, as Garland has insisted, the practices of punishment are not reducible to an instrumentality and

“An awareness of penalty's wider significance makes it easier to argue that the pursuit of values such as justice, tolerance, decency, humanity and civility should be part of any penal institution's self-consciousness - an intrinsic and constitutive aspect of its role - rather than a diversion from its 'real' goals or an inhibition on its capacity to be 'effective'.” (Garland 1990: 292)

The author sees the practices of punishment, then, as irreducibly moral activities, involving hardships, deprivations and impositions on offenders, with implications for actual and potential victims and for the whole society in whose name these practices take place. Attempting to influence people's thinking and behaviour (the contemporary characterisation of probation practice) is also plainly a moral enterprise: even if there is a transcendent justification - for example, public protection - the way in which this is undertaken is not morally neutral.

The author's academic background was in classics and philosophy. Intellectually engaged by debates about the philosophy of punishment, he tried to see how these ideas worked out in the world of criminal justice practice. The first endeavour exposed the methodological shortcomings of philosophy (see page 16). At the same time, he realised that, while empirical investigation is called for to make discoveries about the world, a critical and analytic approach is needed to direct investigation, to clarify purposes and to interpret results. The author believes that conceptual clarification has been among his contributions to knowledge.

*The Published Works: Chronology*

The first of these works was written while the author was a Senior Probation Officer in a busy city probation field team. At that time, too, he was trying to develop the local Service policy in working with offenders believed to be mentally disordered. By 2002, when the second paper was published, the author had moved to work in a University. Just before this change of profession, opportunities had arisen to work as part of a project on the development of non-custodial sanctions in Ukraine, led by the Human Rights Law Centre, University of Nottingham. The '**Concept Paper**' (2003) is the second edition of a paper that tries to 'scope' the project, the challenges facing the Ukrainian criminal justice system and the potential for the development of community sanctions and measures. **Penal Policy Transfer** (2006) is a later theoretical account which tries to make sense of this work in Ukraine, to examine its implications for 'policy transfer' initiatives and to see what activities of this type can contribute to a general understanding of criminal justice.

**Canton 2005** returns to the subject of mental disorder and offending, but looks at this in the context of risk assessment and compliance - topics that have often been disconnected, but which this paper argues need to be considered side-by-side. **Canton (forthcoming)** is another consideration of mental disorder and offending, distinguished by a more deliberate attempt to think through the practice implications of the earlier critical discussions.

The question of compliance with community punishments has been explored by the author in papers written with Tina Eadie (**Canton and Eadie 2004, 2005**). The earlier paper discusses the challenges of working with young offenders; the second looks more generally at this question of compliance with community punishments and emphasises the importance of the idea of *legitimacy*. The author's thinking on this is consolidated and developed in a general chapter, written with George Mair, on community punishment (**Mair and Canton 2007**). In the final paper in this selection of published works, **Canton (2007)** looks at other aspects of probation values and justice.



### *The Published Works: A Summary*

In this section, the published works will be summarised. The papers will be organised around their overt themes – mental disorder and offending, enforcement of and compliance with community penalties, international penal policy transfer and probation values. Later in this commentary other unifying themes will be identified and explored.

#### *(i) Mental disorder and offending*

**Mental Disorder, Justice and Censure** (1995) argues that criminal justice legislation normally requires punishment to be proportionate to the wrong done, but that this limiting principle is set aside in the case of offenders believed to be mentally disordered – often leading to excessive compulsory intervention, although in some cases to leniency. At the same time, under mental health legislation, psychiatric treatment may ordinarily be imposed compulsorily only where people pose a risk of harm to themselves or others, but this safeguard is dispensed with in the case of defendants involved in criminal proceedings. A diagnosis of mental disorder is taken to be sufficient warrant to treat offenders compulsorily, even when there is no demonstrated association between the disorder and the offending. Indeed such an association is taken to be self-evident: once a positive psychiatric assessment has been made, the tendency is to see all behaviour through this lens, denying to mentally disordered people the familiar rich repertoire of human motivation. The main thesis is that the 'censure' (Sumner 1990) *mentally disordered offender* evokes suspicion of unpredictability, irrationality and dangerousness. These sentiments lead to rejection by mental health and criminal justice services and have the effect of drawing into the criminal justice system a 'group' of people who policy prescribes should be diverted away from it.

These themes are developed in **Rights, Probation and Mentally Disturbed Offenders** (2002) which elaborates the critique of diversion as

'the' response to offending by people who are believed to be mentally disordered. This chapter also looks at the origins of the *dangerous and severe personality disorder* programme and, in the context of the human rights theme that characterised the collection of papers in which this chapter was published, argues that there is a clear trend to understand offending in psychiatric terms and inquires into the implications of this. The paper considers the tactical and economic deployment of psychiatric diagnoses, arguing that an ascription of mental disorder often involves more than a purely clinical judgement. As in the earlier (1995) paper, this chapter is interested not only (indeed not mainly) in the characteristics of a 'group' denoted by the term *mentally disturbed offender* but in the provenance, significance and implications of the term and its application.

**Risk Assessment and Compliance in Probation and Mental Health Practice** (2005) further develops some of these thoughts and considers how a preoccupation with risk – the putative risk of harm to others posed by people with a mental disorder – has dominated and distorted mental health policy to the detriment of other legitimate policy objectives. The paper reviews risk assessment approaches critically and suggests that, since the main purpose of assessment is less to predict than to reduce risk, gains in predictive accuracy achieved by actuarial risk assessment are offset by its loss of a connection between the assessment of risk and its management. Risk management strategies are considered and the challenges and opportunities of inter-agency work explored. The emphasis on risk typically gives rise to coercive practices that attempt to dispense with the consent of the person concerned, but risk management must take account of the person's reaction to supervision and will be at its most effective when the individual's consent and participation are engaged – or, at the least, they are not estranged from the risk management plan. Thus risk assessment needs to be considered side by side with questions of compliance. This paper therefore unites two principal themes in Canton's work – mental health and compliance.

**Working with Mentally Disordered Offenders** (forthcoming) represents the author's fullest attempt so far to explore the practice consequences of the critique of mental disorder elaborated in the earlier papers. The author has come to think that the term *mentally disordered offender* defies definition because it does not (and could not) denote a group of people whose members have enough in common with one another to be considered *as a group* or are sufficiently different from many others who fall outwith the definition. At the same time, the author has never wanted to deny the realities of mental distress and argues in this chapter that a denial of distinctive need can be as discriminatory as an exaggeration of difference. The role of workers in the community justice sector in working with mentally disturbed offenders is discussed and the potential contribution of social interventions to the amelioration of mental distress is affirmed in contrast to the (over-)medicalised understanding of mental disorder that usually dominates policy and practice.

*(ii) Enforcement and compliance*

**Social Work with Young Offenders** (Canton and Eadie 2004) explores the concepts of professional discretion and accountability and the relationship between them. The idea that accountability is ensured by minimising practitioner discretion is challenged and the authors argue that narrow discretion neither guarantees accountability nor is entailed by it. The argument is applied particularly to the question of gaining the compliance of young offenders with the requirements of a community penalty: the ever tighter prescriptions of National Standards are argued to be a constraint on both effectiveness and justice.

This argument is developed and applied to offenders more generally in **From Enforcement to Compliance: Implications for supervising officers** (Canton and Eadie 2005). An historical review discerns trends towards tougher enforcement and towards increased requirements in community penalties (with a consequent greater scope for default) - a

combination of policy trends that irresistibly leads to more prosecution for non-compliance. The authors question whether tougher enforcement conduces towards other Probation Service objectives like reduced reoffending or effective risk management. The paper also applies the important work of Anthony Bottoms (2001) to the realities of community supervision, suggesting that the different mechanisms of compliance must be made to work together and that over-reliance on threat of breach<sup>1</sup> may have undermined normative compliance. People are more likely to comply with demands made upon them that are seen to be fair and when their own interests and concerns are respected: this involves individual attention and, echoing the 2004 chapter, a wide level of discretion.

**Sentencing, Community Penalties and the Role of the Probation Service** (Mair and Canton 2007) consolidates these arguments. It comments on the disconnection between the subtle understandings of human motivation that inform contemporary probation practice and the bluntness of an enforcement strategy that relies mainly on threat to try to achieve compliance. In the context of quite a detailed historical review (written by Mair), the chapter looks at three specific community penalties to explore how some of the theoretical challenges around compliance work out in practice (this section written by Canton). The importance of the purposes of community punishment is affirmed and it is suggested that typically a community penalty has several purposes which may not be assumed to be congruent.

*(iii) International penal policy transfer*

**The Development of Alternative Sentences to Imprisonment in Ukraine** (2003) is the second edition of a 'Concept Paper' that discusses the possibility of developing community sanctions in Ukraine. By that time,

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<sup>1</sup> The word 'breach' is used in the literature in two distinct senses: (a) to refer to an instance of non-compliance with an Order's requirements; (b) to refer to the process of prosecuting an offender for non-compliance. Throughout this commentary, the word is used in this second sense only.

the author had been involved in a project in that country for some three years and the paper sets out the project's experience, achievements, challenges and potential. **Penal Policy Transfer: A Case Study from Ukraine** (2006) discusses this theoretically and tries to understand the activity of taking penal practices, ideas and experiences from one jurisdiction to another. It is argued that while there has been some important historical work done to try to discern influences on penal policy and practice, international comparison is less frequently deployed in this way. Yet the circumstances in which a transfer succeeds or fails can illuminate the character and significance of penalty.

*(iv) Probation values*

**Probation and the Tragedy of Punishment** (written earlier though published later than some of the other papers) argues that its many and irreconcilable objectives and values make punishment almost always a disappointment. Probation has insufficiently recognised this in its discussions of its own values and practices. The paper also considers these values themselves, affirming a tight conceptual connection between an affirmed value and action: values are action-guiding and the litmus test of sincerity is less what is said than what is done. Specific value claims are analysed to determine what it would be to give expression to these values in practice.

*Purpose of this Overview*

This overview will seek to demonstrate that an apparently disparate set of topics – mentally disordered offenders, enforcement and compliance, policy transfer, probation values – is bound together by a number of identifiable themes. These themes have, to be sure, developed over the period of publication and further development is anticipated. They have also been applied to different areas of criminal justice and probation practice and this has led to their further elaboration and refinement.

Two themes stand out:

- ♦ the concept of *legitimacy* which points to the need for (and possibility of) an alliance between moral principles and effective practice
- ♦ the complexity of 'penality' (Garland and Young 1983) – both in terms of the influences that shape it and of its many meanings, functions and consequences.

## Chapter Two: Ironic outcomes, Discretion and Diversity

### *The Philosophy of Punishment*

Debates in the ethics of punishment have concentrated on its purposes and justification (Acton 1969; Honderich 1984; Ten 1989). The deprivations which states impose upon some of their citizens for the wrongs that they have done call for justification: states, after all, are supposed to protect and promote the rights of their citizens and not to diminish them. Here the conventional initial distinction has been between *retributivism* (which grounds the justification of punishment in principles of desert and culpability) and *reductivism* (which holds punishment to be justified by its consequences and which, incidentally, is therefore amenable to an empirical inquiry into these consequences in a way that retributivism is not). This appears to be a special case of the distinction in ethics between *deontic* approaches (which understand moral conduct in terms of obligations and duties) and *consequentialist* philosophies, of which utilitarianism is probably the best-known example, which hold that actions are justified by their consequences.

When the author first became aware of the debate, it was conventional to present these paradigms as irreconcilable (Acton 1969). Yet each is compelling. Retributivism respects our strong moral intuition that it is repugnant to punish innocent people; that punishment should be in proportion to desert; that more serious crimes should receive weightier punishments; that like cases should be treated alike. Reductivism recognises that presumably the whole point of a criminal justice system is to reduce the incidence of offending and its practices should contribute to this. Retributivism typically invokes justice; reductivism appeals to a social utility like public protection. Each, then, captures something important about punishment that seems to elude the other and attempts have therefore been made to reconcile them. For example, Hart (1968) argued that while the justification for the *institution* of punishment was essentially

reductivist, the sole and sufficient justification for the *distribution* of punishment in particular cases must be retributive.

**Canton's (1995)** investigation set out to put these philosophies of punishment to the test by exploring the implications of applying them to complex cases. Both principal paradigms assume that people are responsible for what they do (otherwise it would be retributively unfair to punish them) and deterrable – that is, sufficiently rational to conform their conduct to the requirements of the law because of the prospect of penalty (otherwise punishment would be gratuitous). How, then, is the law to deal with those who are believed to be not (or not fully) responsible or rational? *Mentally disordered offenders* and children represent the clearest examples.

The **1995** paper was written not long after the implementation of the Criminal Justice Act 1991 at a time when probation practitioners were preoccupied with exploring its implications. This Act required courts to make (retributive) desert the guiding principle of sentencing. Desert could be exceeded in certain stipulated cases and, once desert had settled the boundaries of the punishment, other purposes could be invoked (Wasik and Taylor 1991). Nevertheless, commensurate punishment is the central theme of the Act (Canton 1993). Desert is best conceptualised as a function of harm and responsibility for that harm. In Nozick's formulation:

$$R = r \times h$$

where  $R$  is the retributively apt punishment,  $h$  is the harm caused and  $r$  is the individual's responsibility for that harm. (Nozick 1974: 60). (Where, for example, conduct has been harm/less ( $h=0$ ),  $R$  will be zero: that is, no punishment is merited; equally, where an individual has *no* responsibility for the harm done ( $r=0$ ) – for instance in a case of automatism – no punishment is merited, whatever the harm).



This allows that responsibility, like harm, admits of *degrees*. Apart from the rare cases where defendants' mental disorder had been found to be so severe as to exculpate them entirely, mentally disordered defendants were liable for sentence: in other words, they were held to be at least to some degree responsible for the wrongs that they had done. How, then, were desert principles to apply to them?

**Canton 1995** concluded that principles like justice and desert were commonly set aside or even considered inapplicable once mental disorder had been ascribed. Retributivism insists that, the less responsible the offender, the less the deserved penalty; in practice, the imposed penalty was often *more* onerous. This seemed at least partly because the suspicion of (an often loosely specified) mental disorder raised anxieties about risk and so seemed to call for measures to protect the public - although often the assumption about risk owed more to cultural stereotypes about madness than to any systematic assessment (**Canton 1995, 2002, 2005**).

Perhaps the experiences of mentally disturbed defendants needed a quite different – possibly therapeutic - justification and it was a mistake to try to comprehend it as punishment. Yet the paper found that the protections that safeguarded mentally disordered citizens in other contexts did not apply to criminal proceedings.

“It might be supposed that identifying people as 'mentally disordered offenders' would involve assigning to them the rights of both groups: instead they are denied the rights of either. Patients rather than offenders, they are made subject to mental health legislation and lose the protection against excessive penal imposition accorded to all other defendants. Then, offenders rather than patients, they are denied the normal protection against compulsory admission to hospital.”  
(**Canton 1995**: 219)

*Perverse outcomes: the dissonance between policy and practice and the limitations of philosophy*

This inquiry raised a number of puzzles which Canton has tried to explore in subsequent writings. The first of these is the uncertain and contingent relationship between criminal justice policy and its outcomes. Cohen's concept of *stories* is illuminating here (Cohen 1985). Cohen points to a discrepancy between the story – the account that practitioners and policy-makers give – and the realities of practice. There is no imputation that the story is necessarily false – much less that those who tell the stories are attempting to mislead. There is no doubt that the political imperative to characterise policy in a particular way may sometimes lead to disingenuousness, but for present purposes the more interesting possibility is that policy is incompletely realised despite the sincere intentions of the policy maker.

It is probably banal to say that policy regularly falters in its implementation. Among the things that most obviously stand between policy and practice are

“... the interpretation and mediation of policies by operational managers, required to balance and implement competing demands within limited resources [and] ... by frontline workers operating within well-established working practices, ideologies and value bases” (Kemshall, 2003: 144).

This mediation can compromise or distort policy. Sometimes, no doubt, there is active resistance; more commonly, perhaps, the qualifications of policy occur when “the carefully wrought criteria of policy encounter the complexity and vicissitudes of real life” (**Canton 2005**: 145) and practitioners deal with this in variable ratios of pragmatism and principle.

More than this, criminal justice policy not infrequently generates ironic and even perverse outcomes. For example:

- ♦ Invoking mental disorder, ostensibly to mitigate, often results in a greater intrusion – and indeed a weightier punishment – than is warranted by the seriousness of the offence itself (**Canton 1995**).

- ♦ A policy of diverting mentally disordered offenders from the criminal justice system into health care services requires that they be identified. Yet this very act of identification commonly precipitates them into the criminal justice system as the only accessible gateway to health services (**Canton 1995**).
- ♦ Comparably, 'alternatives to custody', ostensibly introduced to reduce the numbers of prisoners, have not succeeded in this and in some ways have had an inflationary effect on the prison population (Canton 1987; **2002**) and contributed to a 'dispersal of discipline' (Cohen 1985).
- ♦ An emphasis on enforcement, intended to bring it about that offenders are more likely to comply with community sentences, can undermine normative mechanisms of compliance (Bottoms 2001) and make compliance less likely. (**Canton and Eadie 2005**)
- ♦ Preoccupation with risk reduction can make services more coercive and can estrange offenders, so increasing their level of risk (**Canton 2005**).

Although the **1995** investigation had set out to consider the application of philosophical retributive principles to *mentally disordered offenders*, Canton had immediately encountered a problem identified by David Garland.

"... many writers in this field [who] feel that a careful reading of moral philosophy - usually of a liberal variety - can somehow supply the guidelines for a new and more acceptable programme of penal policy. But in my view, there are reasons why such a project is both premature and misdirected. It seems to me that at present we lack a detailed appreciation of the nature of punishment, of its character as a social institution, and of its role in social life." (Garland 1990: 9)

The image on which philosophies of punishment are typically based, then, is "an impoverished one [ which] fails to capture the full dimensions and complexities of punishment, [so that] the solutions offered by philosophy are unlikely to match up to the problems of the institution." (*ibid.*) Garland's perception sets the debate in a different framework and suggests a

reframing of the paradigmatic opposition between retributive and reductive understandings. In subsequent writings, especially **Tragedy (2007)** and **Transfer (2006)**, Canton has tried to work with a richer understanding of penalty. Further, the author now believes that an insufficient appreciation of these complexities is itself part of the reason why policy so often disappoints.

In the particular case of mentally disordered offenders, Canton suggested that part of the reason why policy misfired was because of a cultural ambivalence towards this 'group'. On the one hand, they are seen as deserving of sympathy – because unwell and not (or not fully) responsible for their misconduct; on the other hand, they are felt to be unpredictable and dangerous. Eadie and Canton (2002) considered another cultural ambivalence - towards young offenders, who are sometimes seen as entitled to understanding and forbearance (because young and perhaps amenable to influence), but at other times demonised (as prolific offenders). It is suggested that policy often reflects and reproduces this type of ambivalence and that practice acts it out.

If the relationship between the policy and its realisation is uncertain, two other important consequences should be noted at this point. First is the methodological point that, with the important exception of McWilliams (1983, 1985, 1986, 1987), whose studies brought him as close to practice as possible, histories of probation are characteristically dependent upon policy statements and are therefore likely to miss crucial aspects of the lived experience. Second, the perspective of the offender is likely to be suppressed: the 'story' will always be told from the point of view of the policy-maker or at best the practitioner. For example, discussions about whether probation is 'really' an exercise in 'care' or 'control' (Harris 1980) rarely inquire into the offenders' perceptions: to what extent is intended control experienced as controlling, or care as caring? This privileging of the perspective of the policy maker and (though to a much lesser extent) the practitioner has suppressed the offender's point of view and consequently

risked misunderstanding. This is close to Matza's (1969) insight that the discipline of criminology, because of its commitment to the 'correctional perspective' with its eagerness to dismiss and to denounce, has distorted the phenomena it seeks to understand.

Psychiatry encounters the same problem. An ascription of madness often has been used to justify silencing people and seeing all their behaviour through the lens of the 'diagnosis' – most notoriously, perhaps, in Soviet psychiatry (Bloch and Reddaway 1977). As Lord Shaftesbury said:

"What an awful condition that of a lunatic! His words are generally disbelieved, and his most innocent peculiarities perverted; it is natural that it should be so; we know him to be insane; at least, we are told that he is so; and we place ourselves on guard - that is, we give to every word, look, gesture a value and meaning which oftentimes it cannot bear, and which it would never bear in ordinary life." (Lord Shaftesbury 1844: quoted **Canton 2002**)

To summarise: policy's relationship with practice is uncertain and contingent. Among the challenges that stand between policy and its implementation are professional interests, individual obduracy, lack of understanding of the policy by those who must implement it and a lack of appreciation of the realities of practice by those who make the policy (**Canton 2006**). The effect of these considerations on implementation can block or distort policy and lead to perverse outcomes. Yet philosophy often mistakes the aspiration for the reality and is consequently at risk of misunderstanding. In particular, the attempt is made to characterise practice without regard to the perception and experiences of service users.

### *Decisions, Discretion and Accountability*

A second theme – with an obvious bearing on the matter just discussed – concerns the character of decision-taking, the appropriate boundaries of discretion and the principle of accountability. The criminal justice system has often been characterised as a process or sequence of decisions

(Bottomley 1973). Taking justice seriously calls for an understanding of how these decisions are arrived at and, in the **1995** paper and subsequently, Canton has tried to investigate this.

A tentative and under-theorised model of decision-taking (which the author hopes to develop in his subsequent work) suggests these parameters:

Statute and case law	since decisions are usually lawful
Standards, Codes, Rules and Guidelines	since most criminal justice agencies specify how they will undertake their work
Local custom and practice	which, for good or ill, seems to persist in defiance of national prescriptions
Professional and occupational culture	acquired in training or apprenticeship, sustained in dialogue with colleagues and often deriving from more or less reflective understandings about what the job requires
Personal beliefs	mediating (and mediated by) other parameters
Agency priorities	which are themselves shaped by political, organisational and resource considerations

All these factors (which operate dynamically and in mutual influence) will be brought to bear on the 'facts of the case' to generate a decision. More than this, the 'facts of the case' do not present themselves straightforwardly, but are shaped by these factors: there are indefinitely many ways in which a state of affairs can be characterised and the eventual description of 'the facts of the case' will depend on the upshot of the several influences identified. Determining 'the facts', then, is more an act of construction than of discovery (compare McConville, Sanders and Leng, 1991)

The complexity is all the greater when a decision plan has to be made and put into effect by different agencies working in partnership. Inter-agency partnership could be seen as an aspiration with a long history of disappointment. **Canton 2005** applied the decision-taking model set out

above to expose some of the difficulties associated with the challenge of partnership. The disparate influences, hard to comprehend even in the case of an individual decision maker, bear on all organisations represented in an inter-agency endeavour: the decision that will emerge from the interaction of these vectors is hard to predict – and the upshot of the attempt to implement that decision even harder. **Canton 1995** speculates that this also contributes to the contingency of the outcomes of policy.

What does justice require here? Fitzgerald had argued that unfair discrimination was more likely where (*inter alia*) “there is an absence of clear guidelines about the criteria on which decisions should be taken” and “there is considerable scope for the exercise of individual discretion”. (Fitzgerald 1993: 11) In the **1995** paper, **Canton** attributed some of the failings of policy to the latitude for practitioner (including sentencer) discretion, which gave a purchase for unreflective and stereotypical understandings of mental disorder to influence judgements.

The author has explored this matter subsequently, especially in his work with Tina Eadie. In these later writings, however, he argues that the problem of unfair discrimination is not to be solved by limiting discretion so much as by maximising accountability. The distinction is important (**Canton and Eadie 2004**). A recognition of the central importance of *accountability* persuaded – and, Canton and Eadie argue, misled – those responsible for probation policy to prescribe practice and to limit practitioner discretion ever more tightly. This was a large part of the rationale for the introduction and promulgation of *National Standards* (for an account and justification, see Hopley 2002). These rules assume a *standard case* and instruct practitioners on how that case should be administered. Once again, though, the hazards of detached policy-making are apparent, since, as Hudson puts it “Once the subject of justice is given back his / her social context and flesh and blood reality, it is clear that difference is the standard case, and that differences are routinely irreducible.” (Hudson 2001: 166)

Responsivity (Chapman and Hough 1998: 6) affirms this principle of difference – that people have different 'learning styles', are variably amenable to different modes of practice, that the same intervention may have different effects. Less obviously, risk and needs assessment processes, avowedly 'neutral', are increasingly being seen to be *gendered*, their significance, application and consequences impacting differently on women and men (Shaw and Hannah-Moffat 2004). The criminogenic needs of women may not be the same as those of men and there are likely to be cultural differences too (Gelsthorpe 2001; Kemshall, Canton and Bailey 2004).

This exposes a central problem of justice. For while justice may require that like cases should be treated alike, it no less requires that relevant differences must be respected. Cases may differ one from another in indefinitely many ways and the tighter the specification of the rules, the less opportunity there will be to accommodate relevant difference. This too may be a source of unfair discrimination. The difficulty for those taking the decision, then, is to determine which differences *are* relevant, but this difficulty is not resolved by ignoring one horn of the dilemma and assuming that treating everyone the same is a guarantee of justice. As Lucas puts it "Good reasons must *individuate*. They must be based on the circumstances of the case, and a decision can be impugned as unfair if either it is based on some factor that is not relevant or it fails to take into account some factor that is." (Lucas 1980: 13 my emphasis)

In her recent research, Rex found the offenders she interviewed gave strong endorsement to the statement that "all offenders are different and should receive different punishments" (Rex 2005: 142). Similarly, in the prison context, Liebling and Price (2001) found that prisoners recognise that equality of treatment can lead to an unfairness of outcome and their ideal is said to be "flexibility within a framework of consistency".



This amounts to a strong *prima facie* case for wide discretion. Yet how broad discretion can be prevented from deteriorating into arbitrariness or unfairness is the central dilemma in this debate (Gelsthorpe and Padfield 2003). As Davis claimed "the exercise of discretion may mean either beneficence or tyranny, either justice or injustice, either reasonableness or arbitrariness" (1969, p.3) Davis argues for openness to guard against unfair or capricious decisions and **Canton and Eadie 2004** therefore urge high levels of *accountability*.

Davis recognised that: "The goal is not the maximum degree of confining, structuring, and checking: *the goal is to find the optimum degree for each power in each set of circumstances.*" (*ibid.* emphasis added) This promising formulation implies that there can be no *a priori* determination of the appropriate balance between the demands of consistency and predictability and the principle, also required by justice, that there must be enough flexibility to respect difference: it will depend on the context and the nature of the decision to be taken. It is at least arguable, incidentally, that this debate has been over-influenced by the philosophy of sentencing. It is not to be assumed that the decisions that probation officers have to take are relevantly similar to sentencing decisions or that the same boundaries of discretion are appropriate.

The safeguard, then, is openness, a precondition of accountability. Here political debate often deploys an impoverished concept of accountability. As Faulkner puts it (in the course of offering his own much richer account), "When accountability is discussed in government, it is not usually democratic accountability that is at issue, but internal accountability brought about by the processes of inspection, audit and performance management." (Faulkner 2001: 63). Gelsthorpe (2001) too has emphasised the ethical significance of accountability and its importance in respecting diversity. The accountability that Canton and Eadie advocate, then, is not just a managerial requirement, but involves a preparedness to explain decisions to colleagues, Courts, the community and indeed to all

with an interest in the decision and *especially to those most affected by it*. This requires *dialogue* about the manner in which decisions are taken and, through the process of debate, negotiation and explanation, understanding is achieved. Rex (2005), following Duff (2001), has insisted that the material form of a punishment and the manner in which it is implemented should advance the purposes of that punishment and the *moral engagement* that they commend can only be achieved through this type of dialogue.

In summary: Canton has investigated the character of decisions in the criminal justice process. The complex interactions among several vectors, especially when a number of agencies are involved in arriving at and giving effect to a decision, further illuminate the challenges of the implementation of policy. Rejecting the managerialist preference for constraining discretion, it has been argued that wide discretion can alone accommodate the diversity of individuals and of circumstances and so observe the requirement of justice to respect relevant difference. This is protected from deteriorating into arbitrariness by an insistence on the value of accountability which, properly understood, is a precondition of ethical practice.

#### *The problem and significance of categories and groups*

Four of the author's papers have discussed *mentally disordered offenders*. He has therefore had to engage with methodological problems of definition (who exactly is being studied) and associated difficulties of who is being affected by policies in this area. **Canton (1995)** found that legal, clinical and lay vocabularies of mental illness overlapped, to be sure, but did not coincide. Different definitions were constructed for different purposes, so that the law and psychiatry had quite variable (and sometimes even incompatible) understandings of who is mentally disordered. Legally, for example, a judgement that a defendant is mentally disordered is necessary but not sufficient for them to be dealt with under mental health (rather than

criminal justice) legislation. As Allen (1987) showed, moreover, a clinical diagnosis is neither necessary nor sufficient to ensure inclusion in the category *mentally disordered offender*. (*Personality disorder* is perhaps the clearest example: the expression is not to be found in the Mental Health Act 1983, while the legal term *psychopath* is no longer to be found in the standard diagnostic manuals.)

An instructive contribution to this comes from the *sociology of censure*, developed by Colin Sumner (1990) and colleagues. To some extent, this is a development of labelling theory (Becker 1963), but it additionally emphasises that the labels we apply to deviant conduct are strongly charged with negative and condemnatory nuance. Not only do these terms express judgements: they are used to elicit or evoke particular attitudes. They are irreducibly moral judgements, whatever their legal or scientific status, and, typically, function as “organized slanders” (Sumner 1990: 16) which signify, denounce and regulate, rather than explain. To investigate the clinical or legal significance of a term like *mentally disordered offenders* is to miss the point. Instead, Sumner argues, the first questions are: “What does the censure mean? When was it first used? And against whom? Who was behind it and who enforced it? What ideological concepts give it such a meaning? What was the political and structural context of its application?” (Sumner 1990: 31) And what, one might add, are the consequences of its application? (**Canton 1995**)

This is not to say that the term is meaningless, much less to deny that some offenders are mentally disturbed. It is, however, to inquire into the significance of designating a group of *mentally disordered offenders*. Indeed **Canton (2002)** argued that it was not possible “to identify a ‘group’ of mentally disordered offenders whose members have as much in common with one another as to constitute a group or are sufficiently different from many offenders excluded by the definition” (255). Part of the problem, as has been suggested, is that people have different reasons for constructing a definition and for ascribing (or resisting) the designation. A Court must

decide that a defendant is *mentally disordered* to bring them within the scope of mental health legislation; a probation officer may be keen to use the term to call upon the support of psychiatric services; a doctor may resist the term because of a shortage of resources or through pessimism about the outcome of treatment. The point is that designating an individual in this way is not a straightforward or politically innocent judgement.

The author has come to think that a great deal of categorisation takes this form. **Canton 2005** argues, for example, that assigning an individual to a risk category, whether or not it is best understood as a prediction about their likely future behaviour, is a main (nowadays *the*) principal determinant of their subsequent experience of supervision and the deployment of associated resources. **Canton 2002** argues that many of the difficulties associated with “dual diagnosis” (see Watkins, Lewellen and Barrett 2001; Rassool 2002) – and, arguably, the term itself – are an artefact of organisational arrangements and that *dangerous and severe personality disorder* is a political construction masquerading as a diagnosis.

This comes near to the Foucauldian idea of a power-knowledge nexus (for example, Foucault 1981). The act of assigning people to groups is an act of power; the knowledge claimed in relation to that group develops in step with the deployment of that power. (Criminology depends on the prison, psychiatry upon the asylum.) There is also a striking (and in no way coincidental) parallel with racial categorisation. The project of assigning humans to racial types or categories – and typically ranking these (Gould 1984) – is intimately connected with projects of conquest and colonisation, having no basis in genetics or other biological sciences. This has not prevented knowledge claims about race and indeed the claim to knowledge is a critical component in the exercise of the power.

As Becker (1963) saw, some censures attain a ‘master status’, coming to constitute the principal frame of reference within which individuals and

organisations relate to the individual so designated – and sometimes a dominant self-identity which influences self-worth and behaviour. A consequence is that individuality is lost and, in assigning an individual to membership of a group, other dimensions of diversity are suppressed. An example is the tendency (already noted) to interpret through the lens of their putative disorder all behaviour by an individual so designated.

“... the attribution of mental disorder closes down the eligibility of other reasons. Madness is the cause of their conduct. Reasons are not to be found - indeed not to be looked for - because these are people who are not reasonable or rational. This is the basis of their being not responsible. If reasons are expressed, they are interpreted in the context of the disorder. Mentally disordered offenders are, in a strong sense, taken to be incapable of meaningful action.

Mentally disordered offenders can and do act for any and all of the reasons that influence others. The denial of this possibility ...sustains and legitimises an attitude to mental disorder which marginalises and, by setting them outside the domain of meaningful human conduct, literally dehumanises mentally disordered offenders” (**Canton 1995**: 217)

People cannot make sense of the world without concepts and categories and it is impossible to envisage a criminal justice (or any other kind of) organisation that tries to function without categories. The practical and ethical problems arise when individuals are understood and dealt with solely in terms of their putative membership of a single ‘group’ without reference to the many ways in which they differ from all others in that category – and, for that matter, the many ways in which they resemble those assigned to other categories.

The author argues (**1995, 2002**) that this is one important origin of unfair discrimination. For example, *mentally disordered offenders* – at least at one time in probation’s history – found it hard to gain access to probation hostels, ostensibly because these hostels could not meet their needs. The effect of this was often to precipitate them into penal custody where their needs were still less likely to be met and with usually prejudicial consequences for their mental state (**Canton 1995**). Again, some

accredited programme manuals are cautious - if not actively exclusionary - in the advice that they give about the eligibility of people believed to be mentally disordered (**Canton 2002**).

In summary: criminal justice agencies unavoidably categorise people into groups. In many cases, the definition of the group is contested and both the categories themselves and the particular judgments made to assign individuals to groups are guided by considerations that reflect the interests of those who take the decisions. (This is why academic attempts to frame detached or neutral definitions are forlorn.) These are acts of construction and ascription, which purport to be acts of discovery. Allocation to a group becomes a principal determinant of the individual's subsequent experiences. In the process, individuality is at risk of being suppressed and justice placed in jeopardy.

In this chapter, the author's earlier writings have been considered. An attempt to explore retributive justice in relation to mentally disordered offenders exposed a number of particular puzzles with which he has struggled in his subsequent writings. Justice continues to be a unifying theme and, as will be seen in the next chapter, remains central to his work.

## Chapter Three: Complexity, Legitimacy and Compliance

*The many meanings and functions of criminal justice and penalty*

**Canton Transfer (2006)** and **Canton Tragedy (2007)** both explore the complexity of criminal justice and penalty. The author follows Garland in appreciating that penal practices are shaped by a wide range of political, social and cultural factors. Following Beattie (1986), **Transfer (2006)** notes that these factors are (at least potentially) *antagonistic*. Punishment is a social institution and:

“Having developed as a means of managing tensions, arbitrating between conflicting forces, and getting certain necessary things done, social institutions typically contain within themselves traces of the contradictions and pluralities of interest which they seek to regulate.” (Garland 1990: 282)

**Transfer** and **Tragedy** are attempts to explore the implications of this for, respectively, the transfer of penal policy and practice and the ethics of probation practice.

How, then, are these factors to be identified and understood? Garland’s analysis was partly anticipated by an influential framework for understanding criminal justice advanced by Michael King (1981). King identifies six ‘models’ - ways of looking at the criminal justice system. Together, these offer the possibility of a rounded appreciation of the practices and institutions of criminal justice and punishment.

The first three King calls ‘practice models’ - ways in which criminal justice policy-makers and practitioners articulate their work. The other three he calls ‘theoretical models’, which illuminate some of criminal justice’s broader functions and significance, whether or not they form part of the official discourse of the system. The table reproduces (and adapts) King’s framework. I have interpolated a seventh – reparative – model, which is plainly a practice model in King’s sense, but seems distinct - not reducible

to the others - and has become much more influential since King wrote. All these theoretical models are picked up and developed by Garland (1990).

<b>Models of Criminal Justice (after King [1981])</b>			
<b>Practice Model</b>	<b>Purpose of Criminal Justice System</b>	<b>Characteristic mode of punishment</b>	<b>Remarks</b>
Due process	Justice	Retributive sentencing – ‘just deserts’	Punishment is ‘for’ justice, which limits what the state may do to accused or convicted people
Crime control	Reduction of crime	Individual and general deterrence; incapacitation	Instrumental sentencing – punishment as socially useful in reducing crime
Treatment <sup>2</sup>	Assessment and treatment of offenders	Treatment interventions	In the broadest sense, to encompass all modes of individualised intervention that seek to change the offender’s behaviour other than principally through fear or physical constraint
Reparative	To make amends	Restorative justice: mediation, conferencing	
<b>Theoretical Model</b>	<b>Function of Criminal Justice System</b>	<b>Manifestations</b>	<b>Remarks</b>
Status passage / Ritual	Denunciation of crimes, vindication of social values	‘ceremonies of degradation’ (Garfinkel 1956)	Emphasises expressive and affective character of punishment (After Durkheim)
Bureaucratic	Management of crime and processing of offences and offenders	‘actuarial justice’ ‘new penology’ (Feeley and Simon 1994)	(After Weber)
Power	Reproduction of power relationships	Unjustified disproportions by (e.g.) race, class or gender in those arrested or imprisoned; criminal justice as reproducing and legitimating structural inequalities	King discusses this just in terms of social class, but the model also needs to accommodate sexism, racism and other forms of oppression. (After Marx, Foucault, feminist and anti-racist critiques)

<sup>2</sup> King calls this a medical model, but there are contemporary variations which invoke the language of education or even simple helping rather than the language of medicine.



King's theoretical models, as further elaborated by Garland, show how practices of punishment are embedded in, reproduce, are shaped by - and reciprocally shape - organisational, social, political and cultural practices and discourses. This vindicates Garland's claim that:

"Punishment is ... an expression of state power, a statement of collective morality, a vehicle for emotional expression, an economically conditioned social policy, an embodiment of current sensibilities and a set of symbols which display a cultural ethos and help create a social identity. ... What appears on its surface to be merely a means of dealing with offenders so that the rest of us can lead our lives untroubled by them, is in fact a social institution which helps define the nature of our society, the kinds of relationships which comprise it, and the kinds of lives that it is possible and desirable to lead there."  
(Garland 1990:287)

Through an exposition and critique of the works of the writers who have developed these distinctive perspectives- especially Marx, Weber, Durkheim, Foucault, and Elias - Garland (1990) uses an historical analysis to put each to the test. His conclusion is that each tends to a reductive (and thus incomplete) understanding of penalty. Scholars in the Marxist tradition, for example, correctly apprehend that penalty reproduces and may act to legitimate structural inequalities, but this 'power' analysis is then mistaken for the whole story. In fact, other influences (not merely epiphenomenal, but with a dynamic of their own) are also operative. Rejecting any single approach, Garland argues that these analyses are best seen as "reciprocal commentaries, mutually deepening". (Garland 1990: 279)

#### *Ukraine: the transfer of penal policy and practice*

In 2000, Canton was invited to contribute to a Human Rights project in Ukraine to develop alternatives to imprisonment in this transitional democracy (Canton 2000). Analysing the experience later (**Canton 2006**), he was to recognise that Garland's understanding had the most profound implications for an activity of this type. If penalty is as 'embedded' as Garland demonstrates, socially, politically, economically and culturally, then

an attempt to 'transfer' penal practices from a different jurisdiction will have engage with all these influences. The newcomer will have to find its place in a specific social and political environment. (More than that, it will have to *make* a place, perhaps causing challenge or disruption, because the whole point of the exercise is to effect change.) One of the most important contributions of **Canton 2006** is that it offers a possibility of an international comparative analysis to complement the historical accounts on which the debate had hitherto depended.

The attempt to introduce certain kinds of penal practice in Ukraine had to recognise the significance of:

Politics	Imported policy or practice may conduce with or else be at odds with other policies. In Ukraine, this project benefited from a broader political aspiration to be seen to be modernising socially and economically.
Economics	Innovation must be affordable.
Technology	Technology must be sufficiently available (e.g. contemporary performance management in UK depends on IT systems that may not be available everywhere).
Commercial markets	This is linked to the points about technology and economics, but is not confined to these, as commercial enterprise becomes increasingly significant in many jurisdictions (Christie 2000)
The framework of law	Many jurisdictions require a Criminal Proceedings Code, as well as the Criminal Code, before a new measure can be implemented, putting a brake on innovation.
Research	Even if penal practice is rarely determined by research, research findings may lend support to (or may undermine) policy initiatives. And 'what works' (what can be shown to work) may not be assumed to be the same in (say) Ukraine as in UK (or Canada).
Criminal justice	These may be 'competitors' or allies to the newcomer. It may be that the newcomer is sufficiently well supported or robust enough

institutions and practices	to fare well in competition, but it will need to find or make its accommodation within an existing context. It may be that the implications for existing institutions are not initially clear and that therefore alliance and resistance shift as the newcomer struggles to establish itself.
Professions	New practices can represent a direct threat to - or conversely an opportunity for - existing professions who will at least mediate the implementation of policy and may resist it decisively. Some personnel may change their perception of their own standing, with implications for their relationship with their managers (for example around proper boundaries of their discretion) - and with other professions.
Pressure groups and networks	Innovations benefit from their champions and the support or opposition of a pressure group can make a significant difference (Nellis 2000).
Media	Similarly, the extent to which the media represent the innovation accurately or else seek to distort it can make a difference to its acceptance at large.
The ethical environment	"The surrounding climate of ideas ... [that] determines what we find acceptable or unacceptable ... our conception of when things are going well and when they are going badly ... our conception of what is due to us, and what is due from us, as we relate to others." (Blackburn 2001: 1)
Culture	There is a sense in which penal practice must resonate with culture, although culture evolves and may well incorporate contradictions, especially in the penal realm. Arguably, culture is insufficiently differentiated in policy transfer discussions.

The author argues that the policy transfer attempt exposes local influences that might otherwise be invisible. In the process, too, features of 'donor' practices and institutions, which had hitherto been too 'present' to be discernible, are also uncovered to deepen understanding of penalty more generally. For example, the practice of *community service*, traditionally theorised in terms of its distinct aims and the contribution it does or could

make to reducing the size of the prison population, depends on a configuration of social, economic and cultural arrangements that are usually too familiar to call for analysis, including:

- A view about what counts as *punishment*
- A cultural understanding of what it is to *make amends*
- A particular cultural attitude towards *labour* and the extent to which it can constitute either punishment or reparation
- Popular and judicial attitudes about what constitutes *socially useful activity*
- An employment market (the availability of and remuneration for work plainly make a difference)
- A welfare state or some other infrastructure that enables people to give up time and labour without payment without prejudice to their own well-being.

*Values in practice, values as practice*

In **Tragedy (2007)** (written straight after **Transfer 2006**), Canton explored the idea of *antagonism* between the several influences that shape penal forms. If penalty is contested, its aims and practices inherently disputable, these tensions may be expected to manifest themselves in penal forms – perhaps in probation practices. Developing the idea that penalty is conflicted, the author now came to recognise that the problem identified in some of his earlier works needed to be reframed. In discussing *mentally disordered offenders* (**Canton 1995, 2002**), he had noted the tension between objectives of punishment and treatment. Similarly, **Canton and Eadie 2004** had spoken of an ambivalent attitude towards young offenders, depending on whether emphasis was given to their status as *young people* (with an implied right to tolerance and understanding) or as *offenders* (which refers to their wrong-doing and consequently evokes expectations of punishment).

The author's more general accounts of penalty now suggested to him that ambivalence is *characteristic* of the emotional reaction to much offending.

Crime and punishment evoke a range of feelings. 'Feelings of fear, hostility, aggression and hatred compete with pity, compassion and forgiveness to define the proper response to the law-breaker.' (Garland 1990: 213-4) For that matter, the social institution of punishment is *multivalent*.

In the course of these reflections, Canton came to be dissatisfied with the way in which 'probation values' are sometimes discussed. In particular, accounts of probation values often generate lists of principles or ideals (**Tragedy 2007** for summary and discussion). The paper raises a number of methodological objections to considering values in this way, including

grounds	What are the grounds, rational or ethical, for affirming these particular principles (rather than others) ?
coherence	How do these different values fit together? Are they compatible?
ordering and derivation	Are some values more important than others? Do some derive from other more fundamental ones?
conflict and priority	If values conflict, is it possible to say which should prevail? Should there be (could there be) some sort of decision procedure?
newcomers	How are the credentials of a new candidate to join the list to be assessed? Or an innovative practice that the list appears not to cover or that challenges an established principle?
realisation	What difference does the affirming of this value make? What would it be to realise this value in practice?

These important questions are evaded by constructing lists of abstract principles. Methodologically, the author takes himself to be challenging

anyone who affirms a 'value' to set out specifically and explicitly what it entails for practice and what implications it may have for other values.

Affirming the tight conceptual connection between values and actions, the author also adopts an insight of Jonathan Glover's that moral philosophy needs to be more responsive to what the world teaches us in our attempts to apply moral principles abstractly framed (Glover 1999). There is a need for a dialogue, as it were, between principles and the real world consequences of their application, by which experiences of trying to realise aims and values should contribute to their progressive refinement. There is a clear connection here with Canton's earlier work in which attention was drawn to the tendency of penal policy to give rise to ironic and unwanted outcomes. Just as the consequences of attempting to give practical expression to values should lead to a refinement of these values, so too should policy, also framed remotely (if not quite abstractly), be much more responsive to what can be learned from the attempt to put it into effect. In future work, the author hopes to give further attention to the nature of Glover's idea of dialogue between 'values' and practice.

**Canton Tragedy (2007)** argues that there is a significant sense in which probation's values are less what the organisation affirms than what it does. There may well be a dissonance here between the abstract precepts that make up the lists in policy documents and the values that are expressed in practice. It would also be instructive to investigate the ways in which some values and approaches are more tenacious (that is, less amenable to eradication by the prescriptions of policy) than has been appreciated.

An example may be probation's relationship with social work. Notoriously, probation formally disavowed social work in the mid 1990s (Smith 2005). From at least the late 1980s, there had been a recognition that probation's new characterisation as *punishment in the community* jarred with its identity as social work. The Criminal Justice Act 1991 had, after all, made

probation a sentence (whereas it had formerly been 'instead of a sentence') and placed the Probation Order on a penal tariff of *loss of liberty* (Wasik and Taylor 1991). The legislation insisted that the Court's sentence had to be commensurate with the seriousness of the offence and probation had to be located within that framework.

In the following decade, however, probation rediscovered – although one suspects that for practitioners they had never really been lost - many principles and methods that are scarcely different from the social work it was supposed to have abandoned. Pro-social modelling, responsivity, motivational interviewing are all informed by principles of respect for persons, care and even self-determination – ideas that sit much more comfortably with social work than with punishment (Cherry 2005). Smith similarly concludes:

“... for all the rhetoric of punishment and public protection, risk management and enforcement, when practitioners decide what they are actually going to do to engage and motivate clients, help them access resources and convey a sense of hope in the possibility of constructive change, they will find themselves using ideas and skills that have emerged from social work theory and research” (Smith 2005: 634)

The point here is not to try to refresh the stale argument about whether probation 'is' social work so much as to argue that the *realities of probation work circumscribe the extent to which policy can change practice*. Whitfield, once more with echoes of Cohen's notion of 'stories', puts it well:

“Some things do not change. The world in which the probation service operates is the real world of social change and conflict, crime and human frailty. Structures, laws, expectations and organisational requirements do change at often bewildering speed but people ... are the threads which are constant ...” (Whitfield 2001: 8 )

These realities continue to insist themselves upon probation practice and are another mediating factor when the attempt is made to implement policy.

### *Enforcement, compliance and motivation*

One of the most inescapable realities of probation practice is the challenge of compliance. This challenge is peculiar to community penalties: community penalties require people to do things - to keep appointments as instructed, to participate in activities, to work, to refrain from things - which, left to themselves, they might choose not to do. This creates the possibility of default. It is true that the best prisons try to engage the active participation of their inmates. Nevertheless, a passive or recalcitrant prisoner is still being punished; an unenforced community penalty, by contrast, is indistinguishable from impunity. Further, the more that is asked of people, the greater the opportunity for default. The Probation Service – certainly until 2001 – was believed to be weak in its response to default (for the history, **Canton and Eadie 2005**) and Hopley notoriously described enforcement as the Service's "Achilles' heel" (2002: 301).

It is worth remarking here that enforcement policy routinely presumes that non-compliance is the result of obduracy and recalcitrance. An alternative motif, sometimes invoked by those who are less enthusiastic about the Standards, is that many offenders live 'chaotic lifestyles' and are incapable of keeping appointments. But recalcitrance and chaos are just two among many reasons why people may not comply with the requirements of an order. 'Can't' and 'won't' are better seen as ends of a spectrum than as mutually exclusive alternatives, since default more typically involves a complex dynamic between ability, opportunity and motivation (Kemshall and Canton 2002). Unless the reasons for non-compliance are appreciated in the individual case, the response may make future compliance still less likely. For example, few things are more demotivating than hopelessness - a sense that change is impossible - and if the supervising officer's response fails to recognise this (perhaps through threats of breach action and the prospect of imprisonment) then this sense of hopelessness is only likely to be confirmed.



A compliance strategy, therefore, needs to have a much fuller and more nuanced understanding of motivation. Practitioners have developed a sophisticated appreciation of the complexity and lability of motivation, involving, for example, ideas like the 'cycle of change' and methods like motivational interviewing and pro-social modelling (see, for example, Trotter 1999; Fleet and Annison 2003; Cherry 2005). It is both striking and ironic, therefore, that enforcement policy resolutely ignores these insights and concentrates on a coercive approach which is known to be of limited effect. The realities of practice, of course, require probation officers to work with the complexities of motivation, but it remains the case that audits and inspections are more likely to focus on formal conformity with Standards.

In framing policy to ensure that the Courts' orders are respected, however, the Probation Service would do better to emphasise compliance rather than enforcement (**Canton and Eadie 2005**; Bottoms 2001; Hearnden and Millie 2004). The object of the exercise must be to give effect to the orders of the court, not just to respond robustly to non-compliance. In its quest for punitive credibility (a quest doomed to bring disappointment – see **Mair and Canton 2007**), the Service has vaunted its rigour in enforcement and soon elides this with breach (return to court). Clear instructions to offenders, backed by the threat of a return to Court and the consequent possibility of imprisonment, have constituted the Service's principal strategy. Meanwhile, successive enactments<sup>3</sup> have encouraged the Courts to consider prison as a fitting response for non-compliance.

Hearnden and Millie (2004) have pointed out, however, that many of the offenders supervised by Probation are amply inured to threat. **Mair and Canton (2007)** add that it is an assumption of many accredited programmes that offenders' *means-ends* thinking is inept and that it is therefore unwise to depend on their ability to think through the

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<sup>3</sup> Powers of Criminal Courts (Sentencing) Act 2000; Criminal Justice and Court Services Act 2000 s.53 set a clear presumption of custody on breach; Criminal Justice Act 2003 Sch 8

consequences of their action, especially at an early stage in the intervention. Rather than depend upon deterrence alone, policy must inquire into the factors that conduce to compliance.

Bottoms (2001) offers a rich analysis here and Canton has drawn heavily on this analysis in his own works (Kemshall and Canton 2002; **Canton 2005; Canton and Eadie 2005; Mair and Canton 2007**). Bottoms identifies several dimensions to the question of compliance: most people in most circumstances, to be sure, take account of the anticipated costs and benefits of their actions ('instrumental / prudential compliance'), but other considerations are influential too. Bottoms distinguishes 'constraint-based' compliance (for example, the extent to which conduct is guided or circumscribed by physical restrictions) and 'compliance based on habit and routine' (typically unreflective patterns of conduct of the kind which cognitive behavioural programmes are attempting to inculcate).

Most important for the present purpose is what Bottoms calls 'normative compliance', a concept which itself has a number of dimensions. Among these is the idea of *attachment* – for example, attachment to a relative or friend who may encourage conformity with the law. For that matter, 'attachment' to a supervising probation officer who demonstrates their concern for and interest in the offender may support compliance (Rex 1999). Centrally, there is the concept of *legitimacy* – people are more likely to comply with expectations on them and to accept decisions when these are fair and reasonable.

Support for the influence on conduct of normative considerations may be found in the writings of Tom Tyler, whose work has been applied to criminal justice studies by Rex (1999) and by Bottoms (2001). Tyler (1990) insists that people are as much influenced by normative considerations as by self-

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envisages heavier penalties and the possibility of imprisonment even when the original offence would not have attracted imprisonment

interest. People are willing to comply with demands made upon them and to accept outcomes that are unfavourable to them just to the extent that they see the demands and the decision *processes* as fair. Authorities that behave fairly achieve a legitimacy that promotes compliance.

In what does such fairness consist? "Normative aspects of experience include neutrality, lack of bias, honesty, efforts to be fair, politeness, and respect for citizens' rights," Tyler suggested (1990: 7) More recently, Tyler has developed this and tried to specify what it is that people value when they appraise the fairness of their dealings with authority. Although Tyler is not writing with criminal justice especially in mind, this account resonates with a number of themes in contemporary probation debate.

<b>Tyler</b>	<b>Contemporary Probation Debates</b>
"First, they value the opportunity to participate and give input when decisions are being made.	This captures the sense of dialogue and negotiation that is intrinsic to communicative accounts of community punishment (Duff 2001; Rex 2005). Through this dialogue, understanding is achieved and how this communication takes place is no less important than what is communicated.
Second, they want procedures to be neutral - unbiased, based upon factual criteria and made via the consistent application of rules.	This is one half of what was described earlier as the central dilemma of discretion. Legitimacy requires that there be rules, applied in a fair-minded way.
Third, they want to be treated with dignity and	This characterisation of fair-dealing comes very close to the idea of <i>pro-</i>

respect, and to have their rights acknowledged.	<i>social modelling</i> (Trotter 1999; Cherry 2005) <sup>4</sup> .
Fourth, they want to feel that the authorities have considered their needs and concerns, and have been honest in their communications with them." (Tyler 2001).	The other horn of the dilemma. Among the things that constitute legitimacy is a sense of being respected as an individual - attention to the many ways in which people differ, being listened to and understood.

With regard to compliance with community penalties, Bottoms's point is that the different dimensions of compliance that he identifies are all significant and must be made to work together (Bottoms 2001). Enforcement policy has limited itself by concentrating on a single dimension – the instrumental / prudential consideration of punishment for non-compliance. Even on this dimension, arguably, the Probation Service has been unimaginative about devising positive incentives to comply – although it is admittedly politically difficult to be seen to be rewarding people for undergoing their punishments. However that may be, in the process of emphasising instrumental (deterrent) incentives, the Service may have subverted the chances of enhancing compliance through its indifference to normative considerations like legitimacy. By inquiring into how supervisors might engage the active consent and participation of offenders, Bottoms's rounded model of compliance offers ideas not just about how the formal requirements of the order (keeping appointments) may be fulfilled, but how the various dimensions of compliance can be deployed in a way that might lead to enduring change.

#### *Legitimacy, diversity and discretion*

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<sup>4</sup> A significant difference is that to describe the behaviour as *modelling* runs the risk of reducing it to a technique, whereas it is morally important for its own sake and does not depend on its contingent outcomes.

Legitimacy is at the centre of many of Canton's writings. This idea unites effective and ethical practice. By insisting on legitimacy, the moral significance of probation is affirmed so that it does not become reduced to psychological engineering. At the same time, there is good reason to think that legitimacy may be an indispensable component of compliance, effective engagement and reduced reoffending.

Appreciation of and respect for diversity is a critical part of legitimacy (Gelsthorpe 2001). Unless people believe that their individual needs and predicaments are understood, they will not feel that they are being fairly dealt with. This attention to people's needs implies a high degree of individualisation and, correspondingly, a high degree of practitioner discretion in working with them (**Canton and Eadie 2004**). Rex found that the offenders in her research study generally believed that sentencing failed to take sufficient account of their backgrounds and of the real impact that the punishment might have upon them. She continues "One might speculate that offenders' perceptions that their circumstances were not being adequately considered may account for some resistance on their part to receiving, or simply an inability to comprehend, what was being conveyed to them." (Rex 2005: 106) If communication forms at least part of the purpose of punishment, this perceived neglect of individual diversity has the most serious implications.

Individualisation is required by justice, since just punishment must take account of its real impact. It is also required by the principles of effective practice, since risk and criminogenic need, as we have seen (above page 21, may not be assumed to be the same for different groups. Appreciation of diversity makes it no longer tenable to limit discretion for the sake of a contrived consistency: fairness is not treating everyone the same, but acknowledging relevant differences.

Can this account help to resolve the dilemma of discretion – the need for both the impartiality and predictability of rules **and** the flexibility to take

account of the very many ways in which circumstances and individuals may differ? This is a subject of continuing investigation by the author in his own work and together with Eadie. Among the inchoate ideas to be developed is the thought that rules might emerge from practice rather than being imposed upon it. By this is meant that rules would be constructed as principled practitioners tried to manage the predicaments of practice in a wise and fair-minded manner. Rules are never final, in the sense that a new set of circumstances might call for their enhancement. A 'case law', as it were, could develop with the possibility of departure from the rules just in those circumstances in which a relevant distinction could be made between the present case and earlier ones. This *ratio decidendi* would then come to inform and enhance the rules. The defence against capriciousness and unfairness would be, as Davis (1969) proposed, openness and accountability in the widest sense explained earlier.

#### *Legitimacy and public opinion*

Legitimacy has so far been considered from the point of view of the offender. Yet criminal justice practice must also command legitimacy with victims, with courts, with the community. This is a strong theme of the Halliday report (Home Office 2001), which is almost Durkheimian in its recognition of the importance of public confidence in criminal justice.

**Canton 2003** discussed this in the context of the Ukrainian projects: a transitional democracy must take proper account of public opinion. This is a considerable problem for several reasons. One difficulty is the time-honoured insistence of objections of *less eligibility* (see **Canton Tragedy 2007**). It seems reasonable, for example, to ask Ukraine to provide a diet for serving prisoners that is sufficiently wholesome and nutritious and to hold prisoners in conditions that conform to the standards of the Council of Europe of which Ukraine is a member. But what is to be said to the reply that significant numbers of law-abiding Ukrainians are malnourished and live in poverty? Another, not unrelated, problem is the likely public attitude

towards offenders at a time of social and economic transition and hardship. The author wrote

“... not only are actual crime rates likely to increase during times of social transition or economic hardship but crime comes to represent general feelings of anxiety or fear (... *Lebensangst*) and people feel more hostile towards offenders. None of this is conducive to positive penal reform.” (**Canton 2003**: 5)

This prompts the gloomy reflection that liberal measures to reduce prison populations are least likely to succeed when they are most necessary.

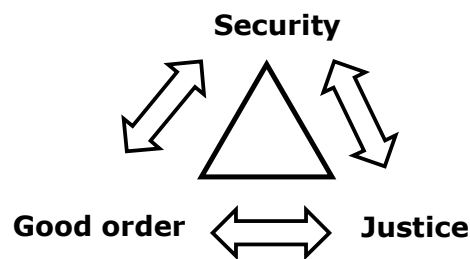
As Freiberg (2001) has shown, crime policy must not only strive to be *effective*, but must take account of the *affective* character of penalty. Crime and responses to it operate emotionally, symbolically and expressively, as well as (more than) at a level of reason and instrumentality (Garland 2001) and this affective force is all the more powerful when a society feels unsettled or threatened – very much a feature of Ukrainian society at the turn of the century. Roughly, legitimacy with offenders seems to involve treating them in the very ways that detract from legitimacy with other members of the public.

**Canton Tragedy (2007)** sees this as another aspect of punishment’s tragedy – its political necessity and ultimate futility - although of course the predicament can be theorised in other ways (Garland 2001). In **Mair and Canton (2007)**, he is pessimistic about the capacity of community punishments to present themselves as *punitively* credible. He does, on the other hand, draw attention to a relatively neglected aspect of credibility: its connection with *purpose*.

#### *Legitimacy and purpose*

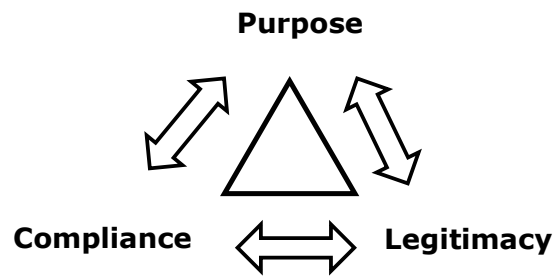
Credibility is conceptually linked to purpose. As a *reductive* measure, for

example, prison's credibility must be in question. The credibility of community sanctions, then, at least partly depends upon their success in achieving their purpose(s). Once again, a parallel with imprisonment suggests itself. In the inquiry after the prison riots in 1991, Lord Woolf famously suggested that there are three components to a well ordered, safe and secure prison: *security*, *discipline* (better framed as *good order* – Morgan 2002) and *justice*. He drew attention particularly to the matter of justice, asserting that the prisons where the riots had taken place were those prisons that had been unable to demonstrate to their prisoners that they were being treated fairly. This, Woolf said, was a precondition of establishing a well-ordered prison. These elements support the prison's function of holding people securely and are therefore significantly inter-related: a well-ordered prison is more secure than one that is not; a prison where prisoners and staff feel they are treated with justice will be better ordered than one where this cannot be shown.



The parallel for community punishment might be that **purpose**, **compliance** and **legitimacy**, in mutual influence and ideally mutually supportive, make up the foundation of community punishment. As Rex (2005) has argued, the manner in which a penalty is administered should advance its purposes.





The rub, however, as the author argues in **Tragedy (Canton 2007)**, is that all punishments try to achieve and express a *number* of purposes and messages which may be incompatible and can be mutually undermining. For example: enforcement requirements (precipitate breach for non-attendance or even breach for manifesting the behaviour that suggested the need for supervision in the first place) can lead to the premature ending of a promising programme and so undermine effectiveness (**Mair and Canton 2007**).

In these sections, then, it has been argued that compliance strategies must take account of legitimacy. Not only can this be shown to be an important influence in securing compliance, it is also a requirement of justice. Procedural justice involves several elements identified by Tyler (1990), including dialogue (the offender's right to be heard in relation to decisions that affect them significantly), impartiality, respect, individuality and honesty. If Tyler is correct, interactions with offenders that are characterised by this regard for justice will promote compliance not just with the Court's order but with the law more generally. To achieve this, however, a high degree of individualisation is called for and accordingly wide practitioner discretion. This may not sit comfortably with the precepts of managerialism, but is a requirement of both effectiveness and justice. Accountability to all with an interest in the decision – and especially to those most affected by it – is the safeguard against partiality and is in no way incompatible with the requisite levels of discretion.

At the same time, legitimacy with the public sits uneasily with the respect and individual attention that brings out the best in people. Punishment's complex and multivalent character generates tensions and contradictions that constitute its tragedy.

## Chapter Four: Contributions to Knowledge and Practice

The author's contributions to knowledge will be reviewed under two headings:

- 1 Theoretical and conceptual
- 2 Contributions to policy and practice

### *Theoretical and conceptual*

What the author takes to be his most important contribution here is his insistence on and analysis of the moral significance of criminal justice practices. As has already been discussed, contemporary managerial and technical conceptualisations have acted to suppress other ways of characterising criminal justice (compare Bottoms 1995). Politically affirmed instrumental priorities (effectiveness, 'what works', evidence-led practice, public protection) typically assume uncontroversial objectives and purport to appraise practices solely on the extent to which they conduce to these outcomes. The author, by contrast, has tried to reaffirm the importance of an *ethical dimension* to criminal justice practice, to recognise that aims are manifold and contested and that the manner in which they are pursued is ethically significant.

One common way of trying to understand the criminal justice process is as a sequence of decisions (Bottomley 1973). Canton has started to develop an inchoate *model of decision-taking* that identifies some of the parameters involved in taking decisions that are ethically sound as well as effective. Although this model was originally conceived to illuminate individual decisions, the author has come to see that the complexities of decision making increase exponentially when different agencies have to take and subsequently implement a collective decision. The argument is adumbrated in **Canton 2005**: inter-agency co-operation is repeatedly enjoined in policy statements and shortcomings in working together are

written about as if attributable solely to inefficiency, technical difficulties (see the analysis in Home Office, Lord Chancellor's Department and Attorney General 2002) mutual suspicions or a jealous protection of professional boundaries (Shapland 1988).

This analysis, however, risks underestimating the complexity of the challenge. A fuller understanding would have to incorporate an appreciation of the challenges of "multiple organisations with diverse goals", (McGuire 2002: 231), who bring profoundly different perspectives to their shared endeavours. There are also formal and informal differences of power (Rumgay 2003), as representatives of different agencies and disciplines strive to negotiate a common set of standards and to construct a vocabulary in which to discuss their concerns. An analysis that adds to an understanding of why inter-agency work so often fails to achieve its full potential is a significant contribution to theory, policy and practice.

Canton has also insisted on the importance of *discretion* – once more a requirement both of justice and effectiveness. Wide practitioner discretion is inimical to managerialism, but the individualisation required both by justice and by effectiveness point to a need for broad discretion. With Eadie, he has been able to clarify the relationship between discretion and accountability: accountability is crucial, but does not entail (nor is required by) narrow discretion (**Canton and Eadie 2004**). Practitioners and policy makers must also hold themselves accountable in a much fuller and wider sense that goes beyond the exigencies of audit, inspection and managerialism. Indeed, as Gelsthorpe (2001) has shown, accountability to those most affected by decisions is a requirement of ethical practice.

In several papers, Canton has explored the ideas of diversity and discrimination. In some cases, unfair discrimination arises because of an *exaggeration of difference*. This has been the historical predicament of

people believed to be mentally disordered: so different are they believed to be that the usual predicates that are used to interpret human conduct – the rich repertoire of motivational influences – are not applied to them: madness alone explains what they do. This denial of agency is then deployed to set them outside the application of justice (**Canton 1995**).

In the course of challenging any sharp differentiation between *mentally disordered offenders* and others, the author has gone so far as to claim that it is probably impossible to construct a useful and meaningful definition of the term (**Canton 2002**). This is a conceptual point: it is not, of course, to deny that some offenders are mentally disordered, much less to attempt a rejection of the very idea of mental disorder. It is, however, a recognition that these definitions are not politically detached or innocent, but typically reflect the interests of the definers. (The construction of the designation *dangerous and severe personality disorder* is a clear recent example.) It is also to insist that, while labels and categories are unavoidable, no one should be dealt with in terms of a diagnostic label alone.

Yet another source of discrimination is the *denial of difference*. Here the assumption of a 'standard case' (implicitly a young white man) is overturned by Hudson's insistence that *diversity* is the standard case (Hudson 2001). National Standards in probation – and no doubt other rules and guidelines in other parts of the criminal justice system – cannot accommodate this broad diversity and ought to have the authority not of prescription but of a presumptive framework within which individual decisions may be taken. It bears repeating that both justice and effectiveness point to this.

The author's application and development of King's (1981) and Garland's (1991) accounts of the many meanings and functions of criminal justice and penalty constitute a further theoretical contribution to knowledge. What has hitherto been a largely *historical* debate about the development of penal

forms and the influences upon them is enriched by the *comparative* analysis put forward in **Canton 2006**. There is very little literature of this type, as opposed to mainly descriptive accounts of particular projects.

The idea that transfer experiences might complement historical analyses to expose the trajectories of criminal justice practice and the influences upon it is a *methodological* innovation. **Canton 2006** described itself as a *case study* because it was felt that the Ukrainian experience permitted some cautious generalisations. In the attempt to take penal practices from one jurisdiction to another, much can be discovered about the practices themselves. Canton has also challenged those involved in this type of work to ponder what are the limits of 'tolerance' (which conditions are necessary, which merely propitious to successful transfer) and indeed what would constitute a successful transfer or adoption. At a time when so many countries, especially in the transitional democracies of eastern Europe, are changing their criminal justice institutions and practices and looking to learn from the experience of longer-established western and northern European jurisdictions, it is plainly critical to develop an understanding of the opportunities and challenges of these attempts at 'transfer'. The author believes that **Transfer (Canton 2006)** is a significant contribution to an understanding of the feasibility and appropriateness of these activities.

The author has further developed Garland's (1991) thoughts about the inherently conflicted character of penality to demonstrate how these tensions are played out in probation practice. Punishment is 'tragic' in the sense that not all of its many purposes can be fulfilled – sometimes because they are not in principle achievable through the formal institutions of penality; sometimes because the achievement of one purpose works systematically against the fulfilment of others.

At the same time, he has insisted that there is a tight conceptual connection between values and practice, that an agency's values may more readily be

inferred from its practices than its pronouncements and that a 'value' is of limited worth unless its implications are made explicit and put to test. The point of affirming a value is to enjoin some kinds of conduct and to rule out other courses of action (**Canton 2007**). Theoretically, the author's challenge to anyone affirming 'probation values' is that they must make plain the practical consequences – the practices commended (and those proscribed) by adopting these values – and appraise the 'fit' among the several values affirmed.

### *Policy and practice*

At the beginning of the Ukraine project, the request from the Ukrainians was for British assistance in establishing a Probation Service (Canton 2001). For reasons that were elaborated in the Concept Papers (Canton 2000; **Canton 2003**), it was felt that there was a considerable amount of preliminary work to be done before that could be realistically considered. Through demonstration projects (showing what might be possible), supported by the training of managers and practitioners, and through discussion with senior staff in the Executive, judges and prosecutors, Ukraine came to a much deeper understanding of its challenges and a more realistic assessment of prospective solutions. The projects themselves demonstrated the feasibility of change and some of the ways in which Ukrainian criminal justice practice, especially the supervision of offenders in the community, might be developed. At the project's conclusion, Ukraine's Criminal Punishment Executive, together with the Ministry of Justice, was again turning to the question of establishing a Probation Service, but now with a much more sophisticated appreciation of what would be involved. The Concept Papers were widely circulated and made a significant contribution to these developments, as a description and an analysis of the challenges facing Ukraine.

In the autumn of 2005, the author was invited to a seminar of the CEP (*Conference Permanente Européenne de la Probation* 2005) and attempted

to summarise the main ideas of **Transfer (Canton 2006)** to an audience of influential probation practitioners and administrators from many European countries. There is reason to think that some of these ideas have had their influence, both theoretically in enhancing an understanding of what is involved in penal policy transfer and practically in guiding the many transfer initiatives that are taking place across central and eastern Europe.

The distinction between discretion and accountability elaborated by **Canton and Eadie 2004** (also Eadie and Canton 2002) has been incorporated into NACRO's good practice guidance in working with young offenders (NACRO 2002). Canton's thoughts on the importance of normative influences on compliance have attracted attention too.

With Eadie, the author has shown how legitimacy is a critical component in achieving compliance - and not just compliance with the formal requirements of the order, but plausibly the compliance that conduces to lasting change. Some of these ideas are to be found in Kemshall and Canton (2002), a report into attrition or 'drop out' from accredited programmes. This paper has been widely cited and is referred to in the Offender Management Model (NOMS 2005). The author claims, through his work with Eadie and with Kemshall, a small contribution to an enhanced appreciation of what is involved in promoting compliance.

These insights have an insufficiently appreciated connection with effective risk management. In **Canton 2005**, the author insists that practices of risk assessment and risk management need to be connected again, having been severed by actuarial approaches (which may generate a probability calculation, but are unable to show how to influence the situation). The author further commends the advantages of considering risk management and compliance side by side. **Canton 2005** suggested that the most effective strategies for managing risk involved recruiting offenders to the strategy as far as possible and in any event not assuming that their



understanding or their attitude could just be discounted. Implicit in much political discussion is the idea that offenders are essentially defiant and uncooperative. Failure to comply with an order's requirements is interpreted as a sign of recalcitrance or personal weakness – both of which call for a robust response. The author has argued that, on the contrary, there are many reasons why people may fail to comply and unless there is a sympathetic and intelligent response to this, the position may well be made worse.

Again, it is assumed politically, the cooperation of offenders who present certain types of risk cannot be relied upon and must therefore be set aside. Yet while cooperation may not always be relied upon and must never be assumed, engagement of the offender in the risk management strategy is often more feasible than is supposed, while a disregard for the offender's attitudes and motivations in this respect is an unpromising premise which invites resistance.

Offenders are not just carriers of risk or need factors. Policy that starts with a model of objectification, seeing an offender as someone to be acted upon, is unethical and ineffective – not least because of its legitimacy deficits. Legitimacy is a precondition of effective engagement with offenders and practices that compromise legitimacy are to that extent less effective. A failure to recognise this can make policy – not least in enforcement and in risk management – self-defeating (**Canton and Eadie 2005**).

The author confesses to disappointment about the lack of impact of his writings – in the theoretical literature or in policy – in the area of mental health. This prompts some reflection. The dominance of medical understandings of mental disorder in the literature and in policy is part of the explanation: a 'deconstruction' of some of the terms in this particular discourse will always struggle to command attention. The premises of policy – that it is possible to distinguish those who are from those who are not

mentally disturbed, that an early identification should be the occasion for diversion from the criminal justice system into mental health care, that mental disturbance is a critical risk factor in assessing the likelihood of further offending – are all questioned by Canton's writings. While it has not been difficult for the author to find support for his arguments in the research of others, policy and theory remain resistant to the implication of these accumulated critiques. His most recent publication (**Canton forthcoming**) applies this to practice and the author hopes that this work will be of value to practitioners. (His contact with practitioners over many years, incidentally, confirms his own impressions that existing practice guidelines and policies are substantially irrelevant to many practitioners supervising offenders who are or may be mentally unwell.)

Throughout the period during which most of these works have been published, Canton has been teaching at De Montfort University and for much of this time was Programme Leader of the BA (Hons) Community and Criminal Justice, leading to the Diploma in Probation Studies (the professional qualification for probation officers). Since 2003, this Programme has contributed to the training of around one quarter of newly qualified officers in England and Wales. In the Midlands, more than 50% of probation officers now hold the Diploma and the proportion is likely to be similar in the East of England. Canton has therefore had an opportunity to influence significant numbers of trainee probation officers and would claim this as another contribution to probation practice.

While the exposition in this commentary has distinguished theoretical and conceptual work from contributions to policy and practice, it is the integration of these contributions that has characterised Canton's work. The initial stimulus to research and publication, as his biography shows, was an attempt to understand practice more deeply and to explore its significance. Just as values are not separate from but immanent in practice (**Canton 2007**), so practice gives expression to certain theoretical principles and precepts. The project of taking the conceptual insights of scholarship to the

realities of practice in working with offenders and of using these real experiences to put theory to the test and refine it has been characteristic of Canton's academic career. It is this facilitation of a dialogue between practice and scholarship that gives integrity to the collection of published works.

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